IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl.A.No.960-DB of 2004
Date of Decision: 17.1.2007

Sucha Singh and another

...Appellants.

Versus

The State of Punjab

...Respondent.

Present : Sh.Binderjit Singh, Advocate for
Sh.H.S.Gill, Sr.Advocate for the appellants.

Ms.Reeta Kohli, Sr.DAG Punjab.

CORAM: Hon'ble Mr.Justice Uma Nath Singh

Hon'ble Mr.Justice A.N.Jindal

A.N.JINDAL, J.

Judgment dated 4.10.2004 passed by the Special Judge, Ferozepur vide which the accused-appellants Sucha Singh, Balwinder Singh (hereinafter to be referred as `accused') were convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as `the Act') for keeping in their possession 20 bags of poppy husk (i.e. 7 quintals and 4 kilograms) in the area of village Arafke and were sentenced to undergo rigorous imprisonment for 12 years and to pay a fine of Rs.1 lac each. In default of payment of fine to further undergo rigorous imprisonment for one year. However, accused Babu Singh, the owner of truck No.PB-05D-9424, who was charge-sheeted under Section 25 of the Act, was acquitted.

The facts, in brief, necessary for disposal of the instant appeal which culminated into trial, are that on 4.5.2001 ASI Bakshish Singh, in-

charge, CIA Staff, Ferozepur alongwith other police officials was holding a picket in the area of village Arafke in connection with the checking of the suspected persons and vehicles. At about 3.30 p.m. Sucha Singh accused, while driving truck No.PB-05D-9424, came from the side of Ferozepur, the Investigating Officer got stopped the truck after giving signal. Accused Balwinder Singh was sitting in the body of the truck. Both the accused tried to escape but they were apprehended by ASI Bakshish Singh with the help of other police officials. On enquiry, they disclosed their names as Sucha Singh and Balwinder Singh. After giving due option of search under Section 50 of the Act in the presence of some Senior/Gazetted officer vide memos Ex.P10 and P-11, the accused persons were searched in the presence of D.S.P. Gowardhan Lal, who reached the spot at 4.30 p.m. in his official zypsy. On search, the Investigating Officer recovered 20 bags of poppy husk from the truck. The Investigating Officer took sample of 200 grams from each bag. On weighment of the remaining bags, these bags were found to contain 35 kilograms poppy husk each. Thereafter, the Investigating Officer sealed the sample parcels and the remaining poppy husk bags with his seal `BS'. Sample seal chit Ex.P1 was prepared separately. The seal, after use, was handed over to ASI Rachhpal. DSP Gowardhan Lal also affixed his seal bearing initials `GL'. The sample parcels and the case property along with the aforesaid truck were taken into possession by the Investigating Officer vide memo Ex.P3. On personal search, a sum of Rs.225/- from accused Sucha Singh and a sum of Rs.350-/ from the accused Balwinder Singh were recovered, which was also taken into possession by the I.O. vide memos Ex.P4 and Ex.P5 respectively. Consequently a ruqa Ex.P16 was sent to the police station on the basis of which formal FIR

Ex.P17 was registered at P.S. Mullanwala. Accused persons were arrested after disclosing them grounds of arrest. On receipt of the report of the chemical examiner Ex.P16/A, these two accused along with accused Babu Singh, ower of the truck, were challaned. Formal charge sheet against accused Sucha Singh and Balwinder Singh under Section 15 and accused Babu Singh, the owner of the truck under Section 25 of the Act was framed to which they pleaded not guilty and claimed trial.

During the course of evidence, the prosecution examined PW1 DSP Gowardhan Lal, PW2 SI Mangat Singh, PW3 Constable Sudesh Kumar, PW4 ASI Joginder Singh, PW5 ASI Bakshish Singh, PW6 ASI Rachhpal Singh, PW7 Mulakh Raj and tendered the report of the chemical examiner in its evidence.

When examined under Section 313 Cr.P.C., all the accused denied the incriminating circumstances appearing against them and pleaded false implication in the case. Accused Sucha Singh further contended that truck No.PB-05D-9424 loaded with marble was lying parked in front of house since the evening of 2.5.2001. In the morning of 3.5.2001 ASI Bakshish Singh along with other police officials came to the village and took away the said loaded truck in the presence of Panchayat on the pretext that the same would be released after interrogation. Later on, he involved them along with truck and Babu Singh in the instant case. He also misappropriated the marble sheets. Accused Balwinder Singh stated that he was brought from his house on 3.5.2001 in the presence of Panchayat from his village and was involved in this false case. He also repeated the other facts as disclosed by accused Sucha Singh. Accused Babu Singh, while opting the plea set up by accused Sucha Singh further stated that he never

allowed the misuse of truck for carrying of narcotics and no recovery was effected from the said truck. Babu Singh examined Gurmail Kaur as a defence witness and consequently accused closed their defence.

On scrutiny of the records of the case, the trial Court while observing that prosecution has been able to substantiate the charge of recovery of 20 bags of poppy husk from the possession of accused Balwinder Singh and Sucha Singh beyond any shadow of reasonable doubt and all the legal provisions have been complied with, held them guilty for the offence. However, while observing that accused Babu Singh was innocent and it was not in his knowledge that said truck was used by the accused for transporting the narcotics, acquitted him of the charges framed against him.

We have heard learned counsel for the accused and learned Sr.Deputy Advocate General, Punjab at length and have scrutinised the record of the case very carefully. We do not find any merit in the first contention raised by the counsel regarding non joining of the independent witness. It may be observed that the police party was on routine checking and placed a picket for general checking of the officials and suspected persons. Therefore, in that situation it was not necessary to join any independent witness. It has also been often seen that joining of independent witness is a futile exercise as they being unconcerned with the state welfare sometimes, join at the time of recovery but later on join hands with the accused for many reasons viz. their social affiliations, material gains, threat, undue influence or hazardous tasks of attending the Courts. It may further be added that there is no mandatory requirement under law to join non-official witnesses at the time of routine checking. In this case, the official

witnesses are not of small status but are of and below the status of DSP. All the three witnesses to the recovery namely PW1 DSP Gowardhan Lal, PW5 ASI Bakshish Singh and PW6 Rachhpal had no axe to grind against the accused. There had no reason or source to arrange the recovery of heavy bulk of poppy husk from their own source and implicate the accused along with the truck. No such allegation has been levelled or proved by the accused.

The official witnesses stand at the equal pedestal with the public witnesses. The only safeguard to be placed in case of official witnesses is that the Court is to scrutinise their testimonies with more anxious care and caution so as to rule out any false implication while keeping in mind the aforesaid safeguard, we have closely scrutinised the testimony of the aforesaid three witnesses. They are quite consistent in their statements on all material particulars. The cross-examination conducted on these witnesses have not bore any such damaging effect which may affect the substratum of the prosecution case. All the three witnesses were not suggested a single question as to how they happened to be in the truck or if witnesses had any animosity against the accused. Only simple suggestion was given that they were brought from their house along with truck and were involved in the case and the truck was loaded with marble sheets. But to my mind the defence taken by the accused stands unproved. No bill or builty has been proved on record in order to show that the accused had brought the marble sheets on the relevant date to their village but neither the vendor nor the person, for whom the marble sheets were bought, has been examined by the accused.

In this case, the truck was apprehended at 3.30 p.m. Sufficient

time was consumed in taking out the samples making weighment of the poppy husk bags preparing the documents. Ultimately, a ruqa Ex.P16 was sent to the police station at 7.30 p.m. on same day i.e. 4.5.2001. The police station was at a distance of 5 kilometers as such the FIR was recorded at 7.55 p.m. in the police station Mullanwala. FIR Ex.P17 further reveals that the special reports were sent to the higher officers through HC Joginder Singh No.822 and the message was also conveyed through wireless. The case property along with sample sealed chit Ex.P1prepared separately was produced before the S.H.O. - in-charge of the police station, who deposited the same in Malkhana on the same day. The aforesaid articles were sealed with three seals bearing impression `BS', `GL' and `MS'. Nothing has been detected from the record, which could be indicative of the fact that the police after arresting the accused, took time for arranging the bags and consequently foisted the same upon the accused. The case property was also produced vide application Ex.P7 before the Illaqa Magistrate, who, on the next day i.e. 5.5.2001, vide his order Ex.P8 verified, as under:

> "Present: SI Mangat Singh and APP for the State.
>
> Heard. The case property (20 bags) of 35 kg. each and 20 separate parcels of 200 grams each duly sealed with the seal bearing impression `BS', `GL' and `MS' have been produced before me today. I have put my initials on the same. Since there is no space in the judicial Malkhana, therefore, the case property is returned to SI/SHO Mangat of Police Station Mullanwala for keeping it in the safe custody in the police Malkhana and to produce the same in the Court

as and when required."

Sd/-

Announced: JMIC, Ferozepur
5.5.2001

Consequently on close scrutiny of the aforesaid three witnesses, we are fully convinced that they have withstood the test of cross-examination. Their credibility and reliability is far from challenge. The mere argument that independent witness was not joined in this case, is hardly sufficient to throw away the testimony of aforesaid three witnesses.

The next contention raised by the counsel for the appellants is that the prosecution has failed to prove the conscious possession of the accused of 20 bags of poppy husk allegedly recovered from the truck. The mere fact that accused Sucha Singh was driving or accused Balwinder Singh was sitting over the bags in the truck, is not sufficient to hold that they were in conscious possession of poppy husk. In support of their contention, they have placed reliance on the judgment delivered by the Apex Court in case **Avtar Singh and others Vs. State of Punjab 2002 (7) SCC 419.**

Having deliberated over the arguments, we are not in agreement with the aforesaid contention raised by the learned counsel for the appellants. The observations given in **Avtar Singh and others' case (supra)** are not applicable in the fact situation of the present case.

In factual scenario of the present case, not only the possession but the conscious possession with regard to the 20 bags of poppy husk has been established by examining the three witnesses namely ASI Bakshish Singh, DSP Gowardhan Lal, ASI Rachhpal Singh. They do not leave it to the presumption as mentioned in Section 35 and 54 of the Act but give

direct evidence of a fact which they had seen. It is not a case of a cleaner or driver, who were sitting only in the cabin. It is also not the case where some of the accused were not apprehended at the spot. It is established by the prosecution by examining the witnesses that one of the accused was driving the truck and the other was sitting over the bags. It is not the case of the prosecution or the defence that bags were lying hidden in the back seat and the accused could not know about the contents thereof. It is not the case of the accused that they were either labourers or stray passengers. It has also come in evidence of prosecution witnesses that on seeing the police party, the accused tried to drive away the truck and they also tried to run away. These circumstances coupled with their silence and failure to explain circumstances as to how they were either driving or sitting over the bags of the poppy husk, strongly excite us to draw inference of their possession much less of conscious possession of the contraband against them. With due regard to the Apex Court judgment delivered in Avtar Singh and others' case (supra), it carries different facts. In that case besides the two persons apprehended at the spot, two other persons had fled away, whose identity could not be established. In those circumstances, the Apex Court was not convinced if the accused so apprehended had knowledge of the articles lying in the truck. Here in this case except the two accused apprehended at the spot, there was no one else, who could be said to have the possession and control of the bags in the truck. Once possession is established, the person, who claims that it was not in his conscious possession, has to establish as to how he came to be in his possession as it specially within his knowledge. What to talk of explaining anything, the accused even did not come forward to say that these articles were placed in the truck without their

knowledge. It was not remotely suggested by the accused to the witnesses that somebody else had kept the articles. Assuming for the sake of arguments, the truck was loaded with the marble sheets, in order to prove the said defence, the accused could prove by documents the person and place as to fromwhere they had brought the marble. Therefore, in the absence of such evidence, strong circumstance indicating the knowledge of the accused qua the contraband can be held to be established. A similar view was taken by the Apex Court in case **Madan Lal and another Vs. State of Himachal Pradesh 2003 Supreme Court Cases (Criminal) 1664** wherein they explained the meaning of conscious possession with the following observations:

1. Whether there was conscious possession has to be determined with reference to the factual backdrop.

(2)The expression `possession' is polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. To work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context if all statutes.

(3)The word `conscious' means awareness about a particular fact. It is a state of mind which is deliberated or intended.

(4)Possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question; while the person whom physical possession is given holds it subject to that power or control.

(5)The word `possession' means the legal right to possession.

(6)Once possession is established the person who claims that it was not a conscious possession has to establish it.

This view was again approved by the Apex Court in case **Durga Prasad Gupta Vs. The State of Rajasthan through CBI 2003 (4) RCR (Criminal) 834.**

The Apex Court in **Avtar Singh's case (supra)** laid emphasis over asking a question regarding possession of the contraband to the accused in their statements under Section 313 Cr.P.C. In that case, not even a single question was asked that they were in possession of poppy husk placed in the vehicle. But the observations given in the **Avtar Singh's case** (supra) are not applicable in the fact situation of the present case.

In the present case, when the charge was framed the accused were duly informed about the allegations regarding their possession of 20 bags without any permit or licence to which they did not plead guilty, the witnesses examined by the prosecution, in the presence of the accused, also stated in so many words that recovery of 20 bags of poppy husk was effected from the truck in their possession and control. Statements of accused under Section 313 Cr.P.C. clearly magnify that the accused was asked so many questions as to how the recovery of 20 bags of poppy husk was effected from their possession. Consequently nothing is left to doubt if the questions with regard to their possession over the contraband were asked. Further the accused were directed to say anything if they wanted and opportunity to lead in defence, was provided. As such the argument that the accused were not asked specific questions regarding possession of the contraband is turned down. We also do not see any merit that the accused on seeing the police party did not turn the truck back as according to the

witnesses, the police party could be seen from a long distance because it depends upon the observations of the driver of the truck and at the same time, we can not speculate as to what was in his mind. It may further be observed that the truck driver may have thought it safe to pass silently through the road than to invite suspicion of the police officials by turning the truck to the back. As regards the partial offer given by the Investigating Officer to the accused under Section 50 of the N.D.P.S. Act, it may be observed that the case does not relate to the personal search where the provisions of Section 50 of the Act are applicable but in this case, the recovery was effected from the truck. Nevertheless the search memos Ex.P10 and Ex.P11 suffer from some defect or these may not strictly conform to the requirements which have been crystalised in judicial precedents about the terms in which an accused is required to be apprised of his right to have a search of his person conducted before a Gazetted officer or a Magistrate yet it is well settled by now that for searching any baggage, vehicle, vessel or premises of which the accused are in his possession, notice under Section 50 of the Act, would not be required. The Apex Court in **Megh Singh v. State of Punjab**, **2003(4) RCR (Crl.) 319** took similar view by making following observations:-

> "A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. [See Kalema Tumba v. State of Maharashtra and another, (JT 1999 (8) SC 293), The State of Punjab v. Baldev Singh, (JT 1999 (4) SC 595) (supra), Gurbax Singh v. State of Haryana, 2001(1) RCR (Crl.) 702 (SC) : (2001) (3) SCC 28]. The language of Section

50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non compliance of Section 50 of the Act is also without any substance."

After discussing the aforesaid Apex court judgments, this High Court also took the same view in case **Uzoma Gabriel Nwachukwu v. State of U.T. Chandigarh 2006 (1) RCR Criminal 293.**

We also do not approve the argument as to why the accused persons did not cover the bags with tripalin if they knew that it was contraband because again it depends upon the state of mind of the accused and their intention to disguise the police officers to project that they were not carrying any contraband. Some emphasis has been laid by the counsel for the appellants that there are some discrepancies in the statements of the witnesses which create doubt over the manner in which recovery was effected. PW1 Gowardhan Lal has stated in his cross-examination that 20 or 25 bags containing grains were also lying in the truck but PW5 ASI Bakshish Singh has stated that there was no other material in the truck except the poppy husk bags. No doubt there is discrepancy but it may be observed that this discrepancy is hardly sufficient to belie the prosecution version as D.S.P. had reached after the truck was apprehended, therefore, he may not be particular about the other articles lying in the truck. Had there been other food-grain bags in the truck then recovery memo regarding those articles would have been prepared separately but that was not so done. In any case, he is quite consistent regarding the bags of poppy husk, therefore,

this minor discrepancy is hardly sufficient to discard his testimony as a whole.

Barring the aforesaid discrepancy and some other minor discrepancies, all the three witnesses have withstood the test of cross-examination, therefore, we see no reason to disbelieve or discredit them. The other argument that no driving licence of accused Sucha Singh was recovered from the truck, also is of no consequence. It would not be necessary that accused Sucha Singh was carrying the driving licence at that time. The defence plea raised by the accused also stands unestablished by any cogent evidence.

No other point has been argued and no other law has been cited before us.

As regards the quantum of sentence, it may be observed that the accused are already in custody since the date of their arrest i.e. 23.7.2001, they are having wife and children behind them. They have already faced such agony of trial, therefore, ends of justice would be met if the sentence is reduced to minimum one.

For the foregoing reasons, we see no merit in the appeal, the same is hereby dismissed with the modification that the sentence awarded against both the accused-appellants is reduced to 10 years. However, the sentence of fine will remain intact.

(Uma Nath Singh)
Judge

(A.N.Jindal)
Judge

17.1.2007
Meenu